

In the High Court of Judicature at Madras

Dated: 14/11/2002

Coram

The Honourable Mr.Justice R.Jayasimha Babu
and
The Honourable Mrs.Justice Prabha Sridevan

Letters Patent Appeal No.47 of 1998

1. The Commissioner,
Hindu Religious and Charitable
Endowments Board,
Nungambakkam, Madras 34.

2. The Assistant Commissioner,
Hindu Religious and Charitable
Endowments, Coimbatore 18. Appellants

-Vs-

1.T.S.Palanichamy
2.Lakshmi
3.Vellingiri
4.Visalakshi
5.Natarajan
6.Balan
7.Krishnamoorthy
8.Ramayammal Respondents

Letters Patent Appeal is filed under Clause 15 of the Letters Patent
Act against the judgment of a learned single Judge of this Court in Appeal
Suit No.812 of 1983 dated 17.12.1997.

!For appellants : Mr.C.Swami,
Special Government Pleader
Civil Side.

^For respondents 1 & 3 : Mr.R.Krishnan

For respondents 2, : No appearance for 4 to 8

:JUDGMENT

(Judgment of the Court was delivered
by R.Jayasimha Babu, J.)

In this appeal filed by the State it is contended that the suit temple is a public temple. The learned single Judge has held otherwise by reversing the judgment of the trial Court.

2. The temple is situated in Thottipalayam village, Palladam Taluk.

According to the plaintiff it is not a public temple and it is one that was installed by his fore-fathers. The temple does not have a Prakaram, does not have a Gopuram and there is no Hundial kept therein. According to the plaintiff, the public were permitted to worship therein on occasions, but not as of right. As against that claim of the plaintiff, the State relies upon the report filed by it by its Inspector in which it is stated that information is received by the Inspector, that the temple was established by the grandfather of the plaintiff. He confirms in that report that there is no Gopuram, no Prakaram and that there is no Hundial kept therein. The only witness examined for the State is that Inspector, who merely states that at the time of his visit there were some people offering worship at the temple. There is no evidence of any Utsava held at the temple at the expense of the members of the public or of any donations made to the temple by the members of the public or that any festival was organised at the temple in which the public participated as of right. There is no evidence of Utsavamoorthy kept therein or of any procession being taken out for any other idol in connection with the poojas performed in that temple.

3. Learned counsel for the State contended that there is a presumption as regards the temples in south India that they are public temples and therefore the burden is heavy upon the plaintiff to dislodge that presumption.

4. The presumption on which the State wishes to rely is not one which is provided in any statute. No such presumption is set out in the Hindu Religious Charitable and Endowments Act. Counsel, however, contends that such a presumption has been recognised by the Courts and on that account has now become rule of law.

5. Counsel relied on the decision of the Privy Council in the case of Mundacheri Koman vs. Achuthan Nair, AIR 1934 PC 230 to which the apex Court referred in the case of T.D.Gopalan vs. The Commissioner of Hindu Religious and Charitable Endowments, Madras, AIR 1972 SC 1716. The decision in Gopalan's case was rendered by a two Judge Bench. The decision of the Privy Council is referred to in paragraph 10 of that judgment thus:

"It seems that the approach of the High Court was also somewhat influenced by the observations of the Judicial Committee of the Privy Council in Mundancheri Koman vs. Achuthan Nair, 61 Ind. App. 405 = AIR 1 934 PC 230 that in the greater part of the Madras Presidency private temples were practically unknown and the presumption was that the temples and their endowments formed public religious trusts. This was, however, not the case in Malabar where large tarwads often established private temples for their own use."

6. The case of Mundancheri Koman decided by Privy Council reported in AIR 1934 PC 230 concerned a temple in a Tarwad in the Malabar area of the then Madras Presidency. It was observed by Sir John Wallis who wrote the opinion for the Council thus,

"In the greater part of the Madras Presidency, where private temples are practically unknown, the presumption is that temples and their endowments form public charitable trusts. This was laid down by Seshagiri Ayyar, J., on

an elaborate consideration of the whole subject in 1920 Mad 42 which was affirmed by the Board in 1924 PC 44."

7. The decision in the case of Lakshmana Goundan vs. Subramania Ayyar, AIR 1924 PC 44 does not set out the proposition set out in the judgment in the case of Mundacheri Koman vs. Achuthan Nair, AIR 1934 PC 230 even though in that appeal (AIR 1924 PC 44) decision rendered in AIR 1920 Madras 42 (Subramani Aiyar vs. Lakshmana Goundan) was the subject matter of appeal. The Privy Council's opinion in that case was written by Sir John Edge. That appeal was decided on the basis of evidence adduced in the case and not on the basis of any presumption that in the greater part of the Madras Presidency the private temples were unknown; On the other hand what was assessed by the Court was the evidence actually before it without reference to any presumption. The Privy Council in the case of Lakshmana Goundan, AIR 1924 PC 44 summarised the facts found by them on the basis of the evidence thus:

"Lakshmana Goundan, the grandfather of the first defendant, lived in a small house which belonged to him in the village of Kalipatta. He was a devout Hindu and originally a poor man. He maintained in his house an idol of the goddess Amman, which was the private idol of his family. He was also a devout worshipper at the public temple at Palni, at which there was an idol of the God Subramaniaswami, and he made yearly pilgrimages to Palni with offerings to that God. It is said, and probably with truth, that he dreamt that he should instal at his house at Kalipatta an idol of the God Subramaniaswami and that the god would come to his house and enable him to foretell events. He did instal that idol at his house, adopted the ritual which was followed at Palni and allowed Brahmins and other Hindus of various castes to worship the idol as if it was a public idol. He acted as the pujari of the idol, and received as the pujari offerings made to the idol by worshippers and fees which he charged in respect of the processions and other religious services. He obtained a great reputation as a holy man and as being enabled by the god to foretell events. The number of Hindu worshippers increased and with the offerings and fees he purchased some jewels for the idol, built for himself another house in the village to which he and his family removed, and he extended the house in which the idol was and added to it covered rooms for the accommodation of the worshippers during the ceremonies of worship. He also constructed a circular road round the place where the idol was for religious processions and he provided the car used in such processions. He also built in the village a rest house for the use of worshippers of the idol. On certain days in each week the Hindu public was admitted by him free of charge to worship in the greater part of the temple, to one part only on payment of fees and to the inner shrine apparently not at all. With the income which he derived from the offerings and fees at the temple he efficiently maintained the temple as if it were a public temple and discharged all the expenses connected with the temple and the worship of the idol there; that may be assumed from the reputation which the temple acquired amongst Hindus. No accounts have been produced, probably he kept none, but it may be assumed that he applied the balance of the income he so obtained to the support of himself and his family and in acquiring for his own benefit and that of his family some immovable property which he possessed before he died."

8. It is on the facts so found that the Privy Council went on to hold that, "On those facts which their Lordships have found they can come to no

other conclusion than that Lakshmana Goundan, the grandfather of the first defendant, held out and represented to the Hindu public that the temple was a public temple at which all Hindus might worship, and that the inference is that he had dedicated the temple to the public. They have come to that conclusion notwithstanding the facts that respectable local witnesses have stated that the temple was a private temple and that on three occasions since this dispute arose the tahsildars reported to the Collector of the District that the temple was not a public temple."

9. The decision rendered in the case of Lakshmana Goundan vs. Subramania Aiyar, AIR 1924 PC 44 was on an appeal from a decision of the Full Bench of this Court comprising of Sadasiva Aiyar, Seshagiri Aiyar and Burn, JJ., in the case of Subramania Aiyar vs. Lakshmana Goundan, AIR 1920 Madras 42. Each one of them wrote a separate opinion. It is the opinion of Seshagiri Aiyar, J. that has been referred to in the case of Mundacheri Koman vs. Achuthan Nair, AIR 1934 PC 230. The judgment of Seshagiri Aiyar, J. discussed at great length every document that had been produced by the parties in the case and after considering the same formulated the point for decision in that case: " Was there a dedication of the shrine for public worship and has the temple thereby become public religious endowment?"

10. The discussion of the evidence spreads over five closely printed pages of the reports. After such consideration of the evidence the learned Judge summed up the facts found on the basis of that evidence and after setting out those facts concluded thus:

"I have dealt with each of these circumstances separately. The cumulative effect of the circumstances relied upon by the plaintiffs is so strong that I have no hesitation in holding that the temple is a public one. The circumstances relied upon by the defendants are all of them explainable with reference to the fact that the original founder was a holy man and that the people trusted his successors to carry out the objects of the trust. A further explanation is furnished by the general attitude of the people in India towards persons whose ancestors had a high reputation for sanctity."

11. It may be observed here that in that case the first defendant in the suit, the descendant of the founder of the temple was convicted of a murder and after his release from prison, had tried to appropriate the properties belonging to the temple for his own use.

12. The learned Judge Seshagiri Aiyar, J. after consideration of the evidence and after having arrived at the conclusion that it is a public temple, made what he termed as certain remarks of 'general character' before he embarked on a consideration of the cases that were cited by the counsel before him. In his words, ... " Before dealing with these cases I should like to make one remark of a general character. In Southern India, excepting Malabar, on which I shall say a few words later on, there is no private temple in which the outside public has established kattalais and in respect of which they have built chatrams for the accommodation of travellers. Mr.Srinivasa Aiyangar with his large experience of litigation told us that he is unable to mention another instance of a similar kind. He referred to temples in Malabar and to private institutions in Bengal..."

13. Thus, the entire foundation for the assumption made that there is a presumption that all the temples in Madras Presidency are public is founded

only on this statement of Seshagiri Aiyar, J. who did not decide the case before him on the basis of any presumption, but who after deciding the case with regard to the evidence placed before him, considered it necessary for him to make certain general observations to the effect that outside public have not established kattalais or built chatrams for private temples in southern India except Malabar.

14. The observations so made are clearly not to the effect that there is a presumption that the temples in the Madras Presidency are public temples. What was actually said was that the learned Judge and also the counsel who appeared in the matter were not aware of cases where public had established kattalais and built chatrams for the accommodation of the travellers in private temples. The observation in AIR 1934 PC 230 that Seshagiri Aiyar, J. had stated that in the greater part of the Madras Presidency private temples are 'practically unknown', is factually incorrect.

15. The words Madras Presidency are not used in the observations of Seshagiri Aiyar, J., who referred to south India and who nowhere stated that there was such a presumption and who certainly did not invoke such presumption for deciding that case.

16. The observations made in the case of T.D.Gopalan, AIR 1972 SC 1 768 by the Supreme Court were not to the effect that there was a presumption. The apex Court in that case referred to what the Privy Council had stated and also noticed that the High Court had apparently been influenced by what had been set out by the Privy Council and in AIR 1934 PC 230.

17. A Division Bench of this Court in the case of Sri Chidambareswara Sivagami Ambigai Temple vs. Commissioner of H.R. & C.E., 1966 1 MLJ 109 after noting that the point for determining was whether the temple is a private one observed thus,

"The principles for decision in such cases have been well established by several decisions of this Court as well as of the Supreme Court. In the first place, unlike the temples in Malabar and Kerala, there is a presumption in the case of temples in South India that they are public, and the onus is on the party, who asserts their private nature, to prove it - Vide Ramaswami Jadaya Goundar v. Commissioner, H.R. And C.E., Madras (1963) 2 MLJ 280. This principle has been laid down many years ago in the Privy Council decision in Koman Nair v. Achuthan Nair, 67 MLJ 788, and has been followed thereafter in the decisions of this High Court."

18. In the decision of this Court in the case of Ramaswamy, (1963) 2 MLJ 280, the following observation has been made:

".....Even though the witnesses examined on the side of the plaintiff are very old people, they are not in a position to give any useful evidence as to the origin of the temple, when and how it was built, with the result that we have necessarily to deal with the matter as a very ancient temple whose origin is unknown. Further, in respect of temple in our parts (Madras State) unlike those in Malabar and Bengal, there is a strong presumption that the temples are public temples."

19. No authority is cited in the judgment in support of that proposition. But it can be safely assumed that the authority for the proposition is the authority relied on in the case of Mundacheri Koman vs. Achuthan Nair, AIR 1934 PC 230.

20. The presumption on which the State wants to rely is thus a presumption which has been wrongly assumed to exist by the misreading of a

judgment delivered way back in the year 1920. On appeal heard by the Privy Council from that judgment the Privy Council did not refer to any presumption and the case was decided on the basis of the evidence adduced in the case. The judgment of Sheshagiri Aiyar, J., was misread and was stated as the source of authority for a proposition which he had not laid down in AIR 1934 PC. The Privy Council in that case (AIR 1934 PC 230) had no evidence on basis on which to lay down that the Court should presume that the temples in Madras Presidency are public temples.

21. It is evident that it is only the erroneous observation made in AIR 1934 PC 230 that has formed the foundation for the statement made in some of the judgments of this Court that there is a 'presumption' or that the 'law is well settled' even when it is not, that the temples in greater part of Madras Presidency are public temples. The apex Court in more than one decision has warned against reading observations in judgments as if they formed part of the statute. Such a warning has been administered in numerous cases and very recently in the case of Gangadhar Behera vs. State of Orissa, 2002 AIR SCW 4271, wherein it has been observed that, "...There is always peril in treating the words of a judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case."

22. Each case has to be decided on the basis of the evidence placed before the Court in that case and not on the basis of any nonstatutory presumption of the nature canvassed for by the State. What is crucial for the purpose of deciding as to whether the temple is a public temple or private is the dedication to the public and the right recognised in public to offer worship at the temple as of right. That question is to be decided on a consideration of the oral and documentary evidence in the case and not on the basis of any nonstatutory presumptions.

23. The apex Court in the case of Gopalan, AIR 1972 SC 1716 has adverted to matters which are required to be considered while deciding as to whether the temple is a public temple or a private temple. The Court therein referred to the decision rendered in the case of Goswami Shri Mahalaxmi Vahuji vs. Rannchhoddas Kalidas, AIR 1970 SC 2025 wherein it has been held that the appearance of a temple though a relevant circumstance was by no means decisive, and that the circumstance the public or a section thereof had been regularly worshipping in the temple as a matter of course and they could take part in the festivals and ceremonies conducted in that temple apparently as a matter of right, was a strong piece of evidence to establish its public character and if offerings were being made by the public and the expenses were being met by public contribution, it would be safe to presume that the temple was public. "In short, the origin of the temple, the manner in which its affairs were managed, the nature and the extent of the gifts received by it, rights exercised by devotees in regard to worship therein, the consciousness of the manager and consciousness of the devotees themselves as to the public character of the temple were factors that went to establish whether the temple was public or private."

24. At paragraph fifteen of that judgment the Court noticed three matters which were regarded as material in the case before it decided that the temple was a private temple. Those factors are -- "The first was that the origin of the Mandapam had been proved to be private. The second was that its management had remained throughout in the members of the Thoguluva family.

The third was the absence of any endowed property. There was no Gopuram or Dwajasthamba nor a Nagara bell nor Hundial in the suit temple." The finding that it is a private temple was recorded after noticing that it had been established by three persons who were outsiders in the sense that they did not belong to the Thoguluva family, used to come and worship at the temple and made offerings there. The Court observed, "But the determination of the question whether the temple was public or private did not depend on some facts or set of facts alone. The entire evidence, both documentary and oral, had to be considered as a whole keeping in view the principles already noticed by us."

25. The test so formulated in that case when applied to the facts before us clearly lead to the same conclusion, namely, that the temple is a private temple. The temple here was founded by the grandfather of the plaintiff. There is no endowment made to that temple by any outsider. The temple does not have Prakaram, but only has Dwajasthamba. There is no Hundial for the public offering. There is no offering of Kattalai by the members of the public. There is no evidence of monies having been expended for the improvement of the temple by any member of the public.

26. In the case of Radhakanta Deb vs. The Commissioner of Hindu Religious Endowments, Orissa, AIR 1981 SC 798, a case similar to the one before us, the Court held that "the cardinal point to be decided is whether it was the intention of the founder that specified individuals are to have the right of worship at the shrine, or the general public or any specified portion thereof." Thereafter, the Court observed that the mere fact that members of the public are allowed to worship by itself would not make an endowment a public unless it is proved that the members of the public had a right to worship in the temple. At paragraph fourteen of the judgment, the Court formulated four tests as providing sufficient guidelines to determine on the facts of each case whether an endowment is of a private or of a public nature. The four tests are - (1) whether the user of the temple by members of the public is of right; (2) Whether the control and management vests either in a large body of persons or within the members of the public and the founder does not retain any control over the management; (3) Whether the dedication of the properties is made by the founder who retain the control and management and whether control and management of the temple is also retained by him; and (4) where the evidence shows that the founder of the endowment did not make any stipulation for offerings or contributions to be made by the members of the public to the temple, this would be an important intrinsic circumstance to indicate the private nature of the endowment.

27. It is in evidence here that there was no stipulation for the public to make any contribution on the occasions they were allowed to offer worship at the temple and that there was no endowment made to the temple by any outsider. The control and the management of the temple at all times was with the plaintiff, even as admitted by the Inspector.

28. The evidence in the case does not establish that there was dedication of the temple for the benefit of the public and that the public could worship therein as of right.

29. The learned single Judge was right in holding that the temple is a private temple. The appeal is dismissed.

Index: Yes

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Copies to

1. The Subordinate Judge,
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Madras.

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